

APPENDIX A: INITIAL REGULATORY FLEXIBILITY ANALYSIS

As required by the Regulatory Flexibility Act of 1980, as amended (RFA),²³⁵ the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this *Notice of Proposed Rulemaking* (NPRM). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the Notice provided in paragraph 123 of the item. The Commission will send a copy of the Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.²³⁶ In addition, the Notice and IRFA (or summaries thereof) will be published in the Federal Register.²³⁷

A. Need for, and Objectives of, the Proposed Rules.

In this NPRM, we continue to examine ways of amending our regulations and policies governing the electromagnetic spectrum and the facilities-based commercial and private wireless services that rely on spectrum, in order to promote the rapid and efficient deployment of these services in rural areas. This NPRM builds upon the work of our Notice of Inquiry, in which we sought comment on how we could modify our policies to encourage the provision of wireless services in rural areas.²³⁸ This NPRM also draws upon the efforts and recommendations of the Spectrum Policy Task Force, which identified and evaluated potential changes in our spectrum policy that would increase public benefits from spectrum-based services.²³⁹ This NPRM proposes several ways in which the Commission can modify and improve its regulations and policies in order to promote such wireless service within rural areas while simultaneously removing any disincentives or other barriers to construction and operation in rural areas.

As a complement to the measures the Commission has already taken, we seek to minimize regulatory costs and eliminate unnecessary regulatory barriers to the deployment of spectrum-based services in rural areas. As reflected in the proposals set forth in this NPRM, we believe there are additional spectrum policy initiatives the Commission can adopt to reduce the overall cost of regulation and increase flexibility in a manner that will facilitate access, capital formation, build-out and coverage in rural areas. Specifically, in this NPRM, we seek comment on the appropriate definition of what constitutes a "rural area" for the purposes of this proceeding.²⁴⁰ We also seek comment on how to define "built" spectrum and we inquire as to

²³⁵ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. § 601 – 612 has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

²³⁶ See 5 U.S.C. § 603(a).

²³⁷ See 5 U.S.C. § 603(a).

²³⁸ Facilitating the Provision of Spectrum-Based Service to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services, *Notice of Inquiry*, 17 FCC Rcd 25554 (2002) ("*Rural NOI*").

²³⁹ See Federal Communications Commission, Spectrum Policy Task Force Report, ET Docket No. 02-135 (released Nov. 2002) ("*SPTF Report*"). This report can be found at www.fcc.gov/sptf.

²⁴⁰ NPRM at ¶¶ 10-12, *supra*.

whether the most efficient approach may be to rely on providers' filings of their construction notifications, an approach used with broadband PCS. Notably, we propose that spectrum in rural areas that is leased by a licensee, and for which the lessee meets the performance requirements that are applicable to the licensee, should be construed as "used" for the purposes of this proceeding and any performance requirements we adopt. Furthermore, we seek comment on ways the Commission could modify its regulations pertaining to unused spectrum.

In this NPRM, we propose the adoption of a "substantial service" construction benchmark during the initial license term for all wireless services that are licensed on a geographic area basis and that are subject to performance requirements. We also propose a substantial service safe harbor for rural areas. We also seek comment on whether we should adopt a geography-based benchmark for wireless services that are licensed on a geographic area basis and that currently do not have a geographic area coverage option. In addition, we seek comment on whether we should impose performance requirements in subsequent license terms after initial renewal. We also seek comment on measures that may be taken to increase power flexibility for licensed services. We also seek comment as to the relative effect on service in rural areas of the Commission's use of small versus large geographic service areas.

In this NPRM, we seek comment on what, if any, regulatory or policy changes should be made to complement the Rural Utilities Service's (RUS) financing programs. We also ask whether we should allow RUS to take security interests in spectrum licenses, provided that any security interest is expressly conditioned on the Commission's prior approval of any assignment of the license from the licensee to the secured party. We also seek comment on whether we should eliminate the cellular cross-interest rule in Rural Service Areas with greater than three competitors, and we seek comment on what should constitute a "competitor." In addition, we seek comment on whether clarifying the Commission's policy on infrastructure sharing may promote service in rural areas. Finally, we propose ways of modifying our rules governing Rural Radiotelephone Service (RRS) and Basic Exchange Telephone Radio Systems (BETRS) to expand the use of these services, including removing eligibility restrictions on the use of BETRS spectrum.

B. Legal Basis.

We tentatively conclude that we have authority under Sections 4(i), 11, 303(r), 309(j) and 706 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 157, 161, 303(r), and 309(j), to adopt the proposals set forth in the NPRM.

C. Description and Estimate of the Number of Small Entities to which the Rules Will Apply.

The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the rules adopted herein.²⁴¹ The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."²⁴² In addition, the term "small business" has the same meaning as

²⁴¹ 5 U.S.C. § 604(a)(3).

²⁴² 5 U.S.C. § 601(6).

the term “small business concern” under the Small Business Act.²⁴³ A “small business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).²⁴⁴

Cellular Licensees. The SBA has developed a small business size standard for small businesses in the category “Cellular and Other Wireless Telecommunications.”²⁴⁵ Under that SBA category, a business is small if it has 1,500 or fewer employees.²⁴⁶ According to the Bureau of the Census, only twelve firms out of a total of 1,238 cellular and other wireless telecommunications firms operating during 1997 had 1,000 or more employees.²⁴⁷ Therefore, even if all twelve of these firms were cellular telephone companies, nearly all cellular carriers are small businesses under the SBA’s definition.

220 MHz Radio Service – Phase I Licensees. The 220 MHz service has both Phase I and Phase II licenses. Phase I licensing was conducted by lotteries in 1992 and 1993. There are approximately 1,515 such non-nationwide licensees and four nationwide licensees currently authorized to operate in the 220 MHz band. The Commission has not developed a definition of small entities specifically applicable to such incumbent 220 MHz Phase I licensees. To estimate the number of such licensees that are small businesses, we apply the small business size standard under the SBA rules applicable to “Cellular and Other Wireless Telecommunications” companies. This category provides that a small business is a wireless company employing no more than 1,500 persons.²⁴⁸ According to the Census Bureau data for 1997, only twelve firms out of a total of 1,238 such firms that operated for the entire year, had 1,000 or more employees.²⁴⁹ If this general ratio continues in the context of Phase I 220 MHz licensees, the Commission estimates that nearly all such licensees are small businesses under the SBA’s small business standard.

220 MHz Radio Service – Phase II Licensees. The 220 MHz service has both Phase I and Phase II licenses. The Phase II 220 MHz service is subject to spectrum auctions. In the *220 MHz Third Report and Order*, we adopted a small business size standard for defining “small” and “very small” businesses for purposes of determining their eligibility for special provisions such as bidding credits and installment

²⁴³ 5 U.S.C. § 601(3) (incorporating by reference the definition of “small business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

²⁴⁴ 15 U.S.C. § 632.

²⁴⁵ 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 517212.

²⁴⁶ *Id.*

²⁴⁷ U.S. Census Bureau, 1997 Economic Census, Information – Subject Series, Establishment and Firm Size, Table 5 (Employment Size of Firms Subject to Federal Income Tax), NAICS code 517212 (2002).

²⁴⁸ 13 C.F.R. § 121.201, NAICS code 517212.

²⁴⁹ U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, Establishment and Firm Size (Including Legal Form Organization), Table 5, NAICS code 517212 (2002).

payments.²⁵⁰ This small business standard indicates that a “small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years.²⁵¹ A “very small business” is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that do not exceed \$3 million for the preceding three years.²⁵² The SBA has approved these small size standards.²⁵³ Auctions of Phase II licenses commenced on September 15, 1998, and closed on October 22, 1998.²⁵⁴ In the first auction, 908 licenses were auctioned in three different-sized geographic areas: three nationwide licenses, 30 Regional Economic Area Group (EAG) Licenses, and 875 Economic Area (EA) Licenses. Of the 908 licenses auctioned, 693 were sold.²⁵⁵ Thirty-nine small businesses won 373 licenses in the first 220 MHz auction. A second auction included 225 licenses: 216 EA licenses and 9 EAG licenses. Fourteen companies claiming small business status won 158 licenses.²⁵⁶ A third auction included four licenses: 2 BEA licenses and 2 EAG licenses in the 220 MHz Service. No small or very small business won any of these licenses.²⁵⁷

Lower 700 MHz Band Licenses. We adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits.²⁵⁸ We have defined a small business as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$40 million for the preceding three years.²⁵⁹ A very small business is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$15 million for the preceding three years.²⁶⁰ Additionally, the lower 700 MHz Service has a third category of small business status that may be claimed for Metropolitan/Rural Service Area (MSA/RSA) licenses. The third category is entrepreneur, which is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than

²⁵⁰ Amendment of Part 90 of the Commission’s Rules to Provide For the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, *Third Report and Order*, 12 FCC Rcd 10943, 11068-70 ¶¶ 291-295 (1997).

²⁵¹ *Id.* at 11068 ¶ 291.

²⁵² *Id.*

²⁵³ See Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated January 6, 1998.

²⁵⁴ See generally “220 MHz Service Auction Closes,” *Public Notice*, 14 FCC Rcd 605 (WTB 1998).

²⁵⁵ See “FCC Announces It is Prepared to Grant 654 Phase II 220 MHz Licenses After Final Payment is Made,” *Public Notice*, 14 FCC Rcd 1085 (WTB 1999).

²⁵⁶ See “Phase II 220 MHz Service Spectrum Auction Closes,” *Public Notice*, 14 FCC Rcd 11218 (WTB 1999).

²⁵⁷ See “Multi-Radio Service Auction Closes,” *Public Notice*, 17 FCC Rcd 1446 (WTB 2002).

²⁵⁸ See Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59), *Report and Order*, 17 FCC Rcd 1022 (2002).

²⁵⁹ *Id.* at 1087-88 ¶ 172.

²⁶⁰ *Id.*

\$3 million for the preceding three years.²⁶¹ The SBA has approved these small size standards.²⁶² An auction of 740 licenses (one license in each of the 734 MSAs/RSAs and one license in each of the six Economic Area Groupings (EAGs)) commenced on August 27, 2002, and closed on September 18, 2002. Of the 740 licenses available for auction, 484 licenses were sold to 102 winning bidders. Seventy-two of the winning bidders claimed small business, very small business or entrepreneur status and won a total of 329 licenses.²⁶³ A second auction commenced on May 28, 2003, and closed on June 13, 2003, and included 256 licenses: 5 EAG licenses and 476 CMA licenses.²⁶⁴ Seventeen winning bidders claimed small or very small business status and won sixty licenses, and nine winning bidders claimed entrepreneur status and won 154 licenses.²⁶⁵

Upper 700 MHz Band Licenses. The Commission released a *Report and Order* authorizing service in the upper 700 MHz band.²⁶⁶ This auction, previously scheduled for January 13, 2003, has been postponed.²⁶⁷

Paging. In the *Paging Second Report and Order*, we adopted a size standard for “small businesses” for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.²⁶⁸ A small business is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years.²⁶⁹ The SBA has approved this definition.²⁷⁰ An auction of Metropolitan Economic Area (MEA) licenses commenced on February 24, 2000, and closed on March 2, 2000. Of the 2,499 licenses auctioned, 985 were sold.²⁷¹

²⁶¹ *Id.* at 1088 ¶ 173.

²⁶² See Letter to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated August 10, 1999.

²⁶³ See “Lower 700 MHz Band Auction Closes,” *Public Notice*, 17 FCC Rcd 17272 (WTB 2002).

²⁶⁴ See “Lower 700 MHz Band Auction Closes,” *Public Notice*, 18 FCC Rcd 11873 (WTB 2003).

²⁶⁵ *Id.*

²⁶⁶ Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission’s Rules, *Second Memorandum Opinion and Order*, 16 FCC Rcd 1239 (2001).

²⁶⁷ See “Auction of Licenses for 747-762 and 777-792 MHz Bands (Auction No. 31) Is Rescheduled,” *Public Notice*, 16 FCC Rcd 13079 (WTB 2003).

²⁶⁸ Revision of Part 22 and Part 90 of the Commission’s Rules to Facilitate Future Development of Paging Systems, *Second Report and Order*, 12 FCC Rcd 2732, 2811-2812 ¶¶ 178-181 (*Paging Second Report and Order*); see also Revision of Part 22 and Part 90 of the Commission’s Rules to Facilitate Future Development of Paging Systems, *Memorandum Opinion and Order on Reconsideration*, 14 FCC Rcd 10030, 10085-10088 ¶¶ 98-107 (1999).

²⁶⁹ *Paging Second Report and Order*, 12 FCC Rcd at 2811 ¶ 179.

²⁷⁰ See Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, from Aida Alvarez, Administrator, Small Business Administration, dated December 2, 1998.

²⁷¹ See “929 and 931 MHz Paging Auction Closes,” *Public Notice*, 15 FCC Rcd 4858 (WTB 2000).

Fifty-seven companies claiming small business status won 440 licenses.²⁷² An auction of Metropolitan Economic Area (MEA) and Economic Area (EA) licenses commenced on October 30, 2001, and closed on December 5, 2001. Of the 15,514 licenses auctioned, 5,323 were sold.²⁷³ 132 companies claiming small business status purchased 3,724 licenses. A third auction, consisting of 8,874 licenses in each of 175 EAs and 1,328 licenses in all but three of the 51 MEAs commenced on May 13, 2003, and closed on May 28, 2003. Seventy-seven bidders claiming small or very small business status won 2,093 licenses.²⁷⁴ Currently, there are approximately 24,000 Private Paging site-specific licenses and 74,000 Common Carrier Paging licenses. According to the most recent *Trends in Telephone Service*, 608 private and common carriers reported that they were engaged in the provision of either paging or "other mobile" services.²⁷⁵ Of these, we estimate that 589 are small, under the SBA-approved small business size standard.²⁷⁶ We estimate that the majority of private and common carrier paging providers would qualify as small entities under the SBA definition.

Broadband Personal Communications Service (PCS). The broadband PCS spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission has created a small business size standard for Blocks C and F as an entity that has average gross revenues of less than \$40 million in the three previous calendar years.²⁷⁷ For Block F, an additional small business size standard for "very small business" was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.²⁷⁸ These small business size standards, in the context of broadband PCS auctions, have been approved by the SBA.²⁷⁹ No small businesses within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 "small" and "very small" business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F.²⁸⁰ On March 23, 1999, the Commission reaucted 155 C, D, E, and F Block licenses; there were 113 small business winning

²⁷² See *id.*

²⁷³ See "Lower and Upper Paging Band Auction Closes," *Public Notice*, 16 FCC Rcd 21821 (WTB 2002).

²⁷⁴ See "Lower and Upper Paging Bands Auction Closes," *Public Notice*, 18 FCC Rcd 11154 (WTB 2003).

²⁷⁵ See *Trends in Telephone Service*, Industry Analysis Division, Wireline Competition Bureau, Table 5.3 (Number of Telecommunications Service Providers that are Small Businesses) (May 2002).

²⁷⁶ 13 C.F.R. § 121.201, NAICS code 517211.

²⁷⁷ See Amendment of Parts 20 and 24 of the Commission's Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, *Report and Order*, 11 FCC Rcd 7824, 7850-7852 ¶¶ 57-60 (1996); see also 47 C.F.R. § 24.720(b).

²⁷⁸ See Amendment of Parts 20 and 24 of the Commission's Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, *Report and Order*, 11 FCC Rcd 7824, 7852 ¶ 60.

²⁷⁹ See Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated December 2, 1998.

²⁸⁰ FCC News, "Broadband PCS, D, E and F Block Auction Closes," No. 71744 (rel. January 14, 1997).

bidders.²⁸¹

Narrowband PCS. The Commission held an auction for Narrowband PCS licenses that commenced on July 25, 1994, and closed on July 29, 1994. A second commenced on October 26, 1994 and closed on November 8, 1994. For purposes of the first two Narrowband PCS auctions, “small businesses” were entities with average gross revenues for the prior three calendar years of \$40 million or less.²⁸² Through these auctions, the Commission awarded a total of forty-one licenses, 11 of which were obtained by four small businesses.²⁸³ To ensure meaningful participation by small business entities in future auctions, the Commission adopted a two-tiered small business size standard in the *Narrowband PCS Second Report and Order*.²⁸⁴ A “small business” is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$40 million.²⁸⁵ A “very small business” is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$15 million.²⁸⁶ The SBA has approved these small business size standards.²⁸⁷ A third auction commenced on October 3, 2001 and closed on October 16, 2001. Here, five bidders won 317 (MTA and nationwide) licenses.²⁸⁸ Three of these claimed status as a small or very small entity and won 311 licenses.

Specialized Mobile Radio (SMR). The Commission awards “small entity” bidding credits in auctions for Specialized Mobile Radio (SMR) geographic area licenses in the 800 MHz and 900 MHz bands to firms that had revenues of no more than \$15 million in each of the three previous calendar years.²⁸⁹ The Commission awards “very small entity” bidding credits to firms that had revenues of no more than \$3 million in each of the three previous calendar years.²⁹⁰ The SBA has approved these small business size

²⁸¹ See “C, D, E, and F Block Broadband PCS Auction Closes,” *Public Notice*, 14 FCC Rcd 6688 (WTB 1999).

²⁸² Implementation of Section 309(j) of the Communications Act – Competitive Bidding Narrowband PCS, *Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 10 FCC Rcd 175, 196 ¶ 46 (1994).

²⁸³ See “Announcing the High Bidders in the Auction of ten Nationwide Narrowband PCS Licenses, Winning Bids Total \$617,006,674,” *Public Notice*, PNWL 94-004 (rel. Aug. 2, 1994); “Announcing the High Bidders in the Auction of 30 Regional Narrowband PCS Licenses; Winning Bids Total \$490,901,787,” *Public Notice*, PNWL 94-27 (rel. Nov. 9, 1994).

²⁸⁴ Amendment of the Commission’s Rules to Establish New Personal Communications Services, Narrowband PCS, *Second Report and Order and Second Further Notice of Proposed Rule Making*, 15 FCC Rcd 10456, 10476 ¶ 40 (2000).

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ See Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission from Aida Alvarez, Administrator, Small Business Administration, dated December 2, 1998.

²⁸⁸ See “Narrowband PCS Auction Closes,” *Public Notice*, 16 FCC Rcd 18663 (WTB 2001).

²⁸⁹ 47 C.F.R. § 90.814(b)(1).

²⁹⁰ *Id.*

standards for the 900 MHz Service.²⁹¹ The Commission has held auctions for geographic area licenses in the 800 MHz and 900 MHz bands. The 900 MHz SMR auction began on December 5, 1995, and closed on April 15, 1996. Sixty bidders claiming that they qualified as small businesses under the \$15 million size standard won 263 geographic area licenses in the 900 MHz SMR band. The 800 MHz SMR auction for the upper 200 channels began on October 28, 1997, and was completed on December 8, 1997. Ten bidders claiming that they qualified as small businesses under the \$15 million size standard won 38 geographic area licenses for the upper 200 channels in the 800 MHz SMR band.²⁹² A second auction for the 800 MHz band was held on January 10, 2002 and closed on January 17, 2002 and included 23 BEA licenses. One bidder claiming small business status won five licenses.²⁹³

The auction of the 1,050 800 MHz SMR geographic area licenses for the General Category channels began on August 16, 2000, and was completed on September 1, 2000. Eleven bidders won 108 geographic area licenses for the General Category channels in the 800 MHz SMR band qualified as small businesses under the \$15 million size standard. In an auction completed on December 5, 2000, a total of 2,800 Economic Area licenses in the lower 80 channels of the 800 MHz SMR service were sold. Of the 22 winning bidders, 19 claimed "small business" status and won 129 licenses. Thus, combining all three auctions, 40 winning bidders for geographic licenses in the 800 MHz SMR band claimed status as small business.

In addition, there are numerous incumbent site-by-site SMR licensees and licensees with extended implementation authorizations in the 800 and 900 MHz bands. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than \$15 million. One firm has over \$15 million in revenues. We assume, for purposes of this analysis, that all of the remaining existing extended implementation authorizations are held by small entities, as that small business size standard is established by the SBA.

Private Land Mobile Radio (PLMR). PLMR systems serve an essential role in a range of industrial, business, land transportation, and public safety activities. These radios are used by companies of all sizes operating in all U.S. business categories, and are often used in support of the licensee's primary (non-telecommunications) business operations. For the purpose of determining whether a licensee of a PLMR system is a small business as defined by the SBA, we could use the definition for "Cellular and Other Wireless Telecommunications." This definition provides that a small entity is any such entity employing no more than 1,500 persons.²⁹⁴ The Commission does not require PLMR licensees to disclose information about number of employees, so the Commission does not have information that could be used to determine how many PLMR licensees constitute small entities under this definition. Moreover, because PLMR licensees generally are not in the business of providing cellular or other wireless

²⁹¹ See Letter to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated August 10, 1999. We note that, although a request was also sent to the SBA requesting approval for the small business size standard for 800 MHz, approval is still pending.

²⁹² See "Correction to Public Notice DA 96-586 'FCC Announces Winning Bidders in the Auction of 1020 Licenses to Provide 900 MHz SMR in Major Trading Areas,'" *Public Notice*, 18 FCC Rcd 18367 (WTB 1996).

²⁹³ See "Multi-Radio Service Auction Closes," *Public Notice*, 17 FCC Rcd 1446 (WTB 2002).

²⁹⁴ See 13 C.F.R. § 121.201, NAICS code 517212.

telecommunications services but instead use the licensed facilities in support of other business activities, we are not certain that the Cellular and Other Wireless Telecommunications category is appropriate for determining how many PLMR licensees are small entities for this analysis. Rather, it may be more appropriate to assess PLMR licensees under the standards applied to the particular industry subsector to which the licensee belongs.²⁹⁵

The Commission's 1994 Annual Report on PLMRs²⁹⁶ indicates that at the end of fiscal year 1994, there were 1,087,267 licensees operating 12,481,989 transmitters in the PLMR bands below 512 MHz. Because any entity engaged in a commercial activity is eligible to hold a PLMR license, the revised rules in this context could potentially impact every small business in the United States.

Fixed Microwave Services. Fixed microwave services include common carrier,²⁹⁷ private-operational fixed,²⁹⁸ and broadcast auxiliary radio services.²⁹⁹ Currently, there are approximately 22,015 common carrier fixed licensees and 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. The Commission has not yet defined a small business with respect to microwave services. For purposes of this FRFA, we will use the SBA's definition applicable to "Cellular and Other Wireless Telecommunications" companies – that is, an entity with no more than 1,500 persons.³⁰⁰ The Commission does not have data specifying the number of these licensees that have more than 1,500 employees, and thus is unable at this time to estimate with greater precision the number of fixed microwave service licensees that would qualify as small business concerns under the SBA's small business size standard. Consequently, the Commission estimates that there are 22,015 or fewer small common carrier fixed licensees and 61,670 or fewer small private operational-fixed licensees and small broadcast auxiliary radio licensees in the microwave services that may be affected by the rules and policies adopted herein. The Commission notes, however, that the common carrier microwave fixed licensee category includes some large entities.

Wireless Communications Services. This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission defined "small business" for the wireless communications services (WCS) auction as an entity with average gross revenues of \$40 million for each of the three preceding years, and a "very small business" as an entity with average gross revenues of \$15

²⁹⁵ See generally 13 C.F.R. § 121.201.

²⁹⁶ Federal Communications Commission, 60th Annual Report, Fiscal Year 1994, at ¶ 116.

²⁹⁷ 47 C.F.R. §§ 101 *et seq.* (formerly, part 21 of the Commission's Rules).

²⁹⁸ Persons eligible under parts 80 and 90 of the Commission's rules can use Private Operational-Fixed Microwave services. See generally 47 C.F.R. parts 80 and 90. Stations in this service are called operational-fixed to distinguish them from common carrier and public fixed stations. Only the licensee may use the operational-fixed station, and only for communications related to the licensee's commercial, industrial, or safety operations.

²⁹⁹ Auxiliary Microwave Service is governed by part 74 of Title 47 of the Commission's Rules. See 47 C.F.R. Part 74. Available to licensees of broadcast stations and to broadcast and cable network entities, broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes mobile TV pickups, which relay signals from a remote location back to the studio.

³⁰⁰ 13 C.F.R. § 121.201, NAICS code 517212.

million for each of the three preceding years.³⁰¹ The SBA has approved these definitions.³⁰² The FCC auctioned geographic area licenses in the WCS service. In the auction, which commenced on April 15, 1997 and closed on April 25, 1997, there were seven bidders that won 31 licenses that qualified as very small business entities, and one bidder that won one license that qualified as a small business entity. An auction for one license in the 1670-1674 MHz band commenced on April 30, 2003 and closed the same day. One license was awarded. The winning bidder was not a small entity.

39 GHz Service. The Commission defines “small entity” for 39 GHz licenses as an entity that has average gross revenues of less than \$40 million in the three previous calendar years.³⁰³ “Very small business” is defined as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.³⁰⁴ The SBA has approved these definitions.³⁰⁵ The auction of the 2,173 39 GHz licenses began on April 12, 2000, and closed on May 8, 2000. The 18 bidders who claimed small business status won 849 licenses.

Local Multipoint Distribution Service. An auction of the 986 Local Multipoint Distribution Service (LMDS) licenses began on February 18, 1998, and closed on March 25, 1998. The Commission defined “small entity” for LMDS licenses as an entity that has average gross revenues of less than \$40 million in the three previous calendar years.³⁰⁶ An additional classification for “very small business” was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.³⁰⁷ These regulations defining “small entity” in the context of LMDS auctions have been approved by the SBA.³⁰⁸ There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and 387 B Block licenses. On March 27, 1999, the Commission re-auctioned 161 licenses; there were 32 small and very small business winning bidders that

³⁰¹ Amendment of the Commission’s Rules to Establish Part 27, the Wireless Communications Service (WCS), *Report and Order*, 12 FCC Rcd 10785, 10879 ¶ 194 (1997).

³⁰² See Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated December 2, 1998.

³⁰³ See Amendment of the Commission’s Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Band, *Report and Order*, 12 FCC Rcd 18600 (1997).

³⁰⁴ *Id.*

³⁰⁵ See Letter to Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from Hector Barreto, Administrator, Small Business Administration, dated January 18, 2002.

³⁰⁶ See Rulemaking to Amend Parts 1, 2, 21, 25, of the Commission’s Rules to Redesignate the 27.5-29.5 GHz Frequency Band, Reallocate the 29.5-30.5 Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, *Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rule Making*, 12 FCC Rcd 12545, 12689-90 ¶ 348 (1997).

³⁰⁷ *Id.*

³⁰⁸ See Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated January 6, 1998.

won 119 licenses.

218-219 MHz Service. The first auction of 218-219 MHz (previously referred to as the Interactive and Video Data Service or IVDS) spectrum resulted in 178 entities winning licenses for 594 Metropolitan Statistical Areas (MSAs).³⁰⁹ Of the 594 licenses, 567 were won by 167 entities qualifying as a small business. For that auction, we defined a small business as an entity that, together with its affiliates, has no more than a \$6 million net worth and, after federal income taxes (excluding any carry over losses), has no more than \$2 million in annual profits each year for the previous two years.³¹⁰ In the *218-219 MHz Report and Order and Memorandum Opinion and Order*, we defined a small business as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and their affiliates, has average annual gross revenues not exceeding \$15 million for the preceding three years.³¹¹ A very small business is defined as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and its affiliates, has average annual gross revenues not exceeding \$3 million for the preceding three years.³¹² The SBA has approved of these definitions.³¹³ At this time, we cannot estimate the number of licenses that will be won by entities qualifying as small or very small businesses under our rules in future auctions of 218-219 MHz spectrum. Given the success of small businesses in the previous auction, and the prevalence of small businesses in the subscription television services and message communications industries, we assume for purposes of this FRFA that in future auctions, many, and perhaps all, of the licenses may be awarded to small businesses.

Location and Monitoring Service (LMS). Multilateration LMS systems use non-voice radio techniques to determine the location and status of mobile radio units. For purposes of auctioning LMS licenses, the Commission has defined “small business” as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding \$15 million.³¹⁴ A “very small business” is defined as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding \$3 million.³¹⁵ These definitions have been approved by the SBA.³¹⁶ An auction for LMS licenses commenced on February 23, 1999, and closed on March 5, 1999. Of the 528 licenses auctioned, 289

³⁰⁹ See “Interactive Video and Data Service (IVDS) Applications Accepted for Filing,” *Public Notice*, 9 FCC Rcd 6227 (1994).

³¹⁰ Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Fourth Report and Order*, 9 FCC Rcd 2330 (1994).

³¹¹ Amendment of Part 95 of the Commission’s Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, *Report and Order and Memorandum Opinion and Order*, 15 FCC Rcd 1497 (1999).

³¹² *Id.*

³¹³ See Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated January 6, 1998.

³¹⁴ Amendment of Part 90 of the Commission’s Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems, *Second Report and Order*, 13 FCC Rcd 15182, 15192 ¶ 20 (1998); see also 47 C.F.R. § 90.1103.

³¹⁵ Amendment of Part 90 of the Commission’s Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems, *Second Report and Order*, 13 FCC Rcd at 15192 ¶ 20; see also 47 C.F.R. § 90.1103.

³¹⁶ See Letter to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated February 22, 1999.

licenses were sold to four small businesses. We cannot accurately predict the number of remaining licenses that could be awarded to small entities in future LMS auctions.

Rural Radiotelephone Service. We use the SBA definition applicable to cellular and other wireless telecommunication companies, *i.e.*, an entity employing no more than 1,500 persons.³¹⁷ There are approximately 1,000 licensees in the Rural Radiotelephone Service, and the Commission estimates that there are 1,000 or fewer small entity licensees in the Rural Radiotelephone Service that may be affected by the rules and policies adopted herein.

Air-Ground Radiotelephone Service. We use the SBA definition applicable to cellular and other wireless telecommunication companies, *i.e.*, an entity employing no more than 1,500 persons.³¹⁸ There are approximately 100 licensees in the Air-Ground Radiotelephone Service, and the Commission estimates that almost all of them qualify as small entities under the SBA definition.

Offshore Radiotelephone Service. This service operates on several ultra high frequency (UHF) TV broadcast channels that are not used for TV broadcasting in the coastal area of the states bordering the Gulf of Mexico. At present, there are approximately 55 licensees in this service. We use the SBA definition applicable to cellular and other wireless telecommunication companies, *i.e.*, an entity employing no more than 1,500 persons.³¹⁹ The Commission is unable at this time to estimate the number of licensees that would qualify as small entities under the SBA definition. The Commission assumes, for purposes of this FRFA, that all of the 55 licensees are small entities, as that term is defined by the SBA.

Multiple Address Systems (MAS). Entities using MAS spectrum, in general, fall into two categories: (1) those using the spectrum for profit-based uses, and (2) those using the spectrum for private internal uses. With respect to the first category, the Commission defines "small entity" for MAS licenses as an entity that has average gross revenues of less than \$15 million in the three previous calendar years.³²⁰ "Very small business" is defined as an entity that, together with its affiliates, has average gross revenues of not more than \$3 million for the preceding three calendar years.³²¹ The SBA has approved of these definitions.³²² The majority of these entities will most likely be licensed in bands where the Commission has implemented a geographic area licensing approach that would require the use of competitive bidding procedures to resolve mutually exclusive applications. The Commission's licensing database indicates that, as of January 20, 1999, there were a total of 8,670 MAS station authorizations. Of these, 260 authorizations were associated with common carrier service. In addition, an auction for 5,104 MAS licenses in 176 EAs began November 14, 2001, and closed on November 27, 2001.³²³ Seven winning

³¹⁷ 13 C.F.R. § 121.201, NAICS code 517212.

³¹⁸ *Id.*

³¹⁹ *Id.*

³²⁰ See Amendment of the Commission's Rules Regarding Multiple Address Systems, *Report and Order*, 15 FCC Rcd 11956, 12008 ¶ 123 (2000).

³²¹ *Id.*

³²² See Letter to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated June 4, 1999.

³²³ See "Multiple Address Systems Spectrum Auction Closes," *Public Notice*, 16 FCC Rcd 21011 (2001).

bidders claimed status as small or very small businesses and won 611 licenses.

With respect to the second category, which consists of entities that use, or seek to use, MAS spectrum to accommodate their own internal communications needs, we note that MAS serves an essential role in a range of industrial, safety, business, and land transportation activities. MAS radios are used by companies of all sizes, operating in virtually all U.S. business categories, and by all types of public safety entities. For the majority of private internal users, the definitions developed by the SBA would be more appropriate. The applicable definition of small entity in this instance appears to be the "Cellular and Other Wireless Telecommunications" definition under the SBA rules. This definition provides that a small entity is any entity employing no more than 1,500 persons.³²⁴ The Commission's licensing database indicates that, as of January 20, 1999, of the 8,670 total MAS station authorizations, 8,410 authorizations were for private radio service, and of these, 1,433 were for private land mobile radio service.

Incumbent 24 GHz Licensees. The rules that we adopt could affect incumbent licensees who were relocated to the 24 GHz band from the 18 GHz band, and applicants who wish to provide services in the 24 GHz band. The Commission did not develop a definition of small entities applicable to existing licensees in the 24 GHz band. Therefore, the applicable definition of small entity is the definition under the SBA rules for "Cellular and Other Wireless Telecommunications." This definition provides that a small entity is any entity employing no more than 1,500 persons.³²⁵ The 1992 Census of Transportation, Communications and Utilities, conducted by the Bureau of the Census, which is the most recent information available, shows that only 12 radiotelephone (now Wireless) firms out of a total of 1,178 such firms that operated during 1992 had 1,000 or more employees.³²⁶ This information notwithstanding, we believe that there are only two licensees in the 24 GHz band that were relocated from the 18 GHz band, Teligent³²⁷ and TRW, Inc. It is our understanding that Teligent and its related companies have less than 1,500 employees, though this may change in the future. TRW is not a small entity. Thus, only one incumbent licensee in the 24 GHz band is a small business entity.

Future 24 GHz Licensees. With respect to new applicants in the 24 GHz band, we have defined "small business" as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the three preceding years not exceeding \$15 million.³²⁸ "Very small business" in the 24 GHz band is defined as an entity that, together with controlling interests and affiliates, has average gross revenues not exceeding \$3 million for the preceding three years.³²⁹ The SBA has approved these

³²⁴ See 13 C.F.R. § 121.201, NAICS code 517212.

³²⁵ See *id.*

³²⁶ 1992 Census, Series UC-92-S-1 at Firm Size 1-123.

³²⁷ Teligent acquired the Digital Electronic Message Service (DEMS) licenses of FirstMark, the only licensee other than TRW in the 24 GHz band whose license has been modified to require relocation to the 24 GHz band.

³²⁸ Amendments to Parts 1, 2, 87 and 101 of the Commission's Rules To License Fixed Services at 24 GHz, *Report and Order*, 15 FCC Rcd 16934, 16967 ¶ 77 (2000) (24 GHz Report and Order); see also 47 C.F.R. § 101.538(a)(2).

³²⁹ 24 GHz Report and Order, 15 FCC Rcd at 16967 ¶ 77; see also 47 C.F.R. § 101.538(a)(1).

definitions.³³⁰ The Commission will not know how many licensees will be small or very small businesses until the auction, if required, is held.

700 MHz Guard Band Licenses. In the 700 MHz Guard Band Order, we adopted a small business size standard for “small businesses” and “very small businesses” for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.³³¹ A “small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years. Additionally, a “very small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$3 million for the preceding three years. An auction of 52 Major Economic Area (MEA) licenses commenced on September 6, 2000, and closed on September 21, 2000. Of the 104 licenses auctioned, 96 licenses were sold to nine bidders. Five of these bidders were small businesses that won a total of 26 licenses. A second auction of 700 MHz Guard Band licenses commenced on February 13, 2001 and closed on February 21, 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses.³³²

Multipoint Distribution Service, Multichannel Multipoint Distribution Service, and Instructional Television Fixed Service. Multichannel Multipoint Distribution Service (MMDS) systems, often referred to as “wireless cable,” transmit video programming to subscribers using the microwave frequencies of the Multipoint Distribution Service (MDS) and Instructional Television Fixed Service (ITFS).³³³ In connection with the 1996 MDS auction, the Commission defined “small business” as an entity that, together with its affiliates, has average gross annual revenues that are not more than \$40 million for the preceding three calendar years.³³⁴ The SBA has approved of this standard.³³⁵ The MDS auction resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs).³³⁶ Of the 67 auction winners, 61 claimed status as a small business. At this time, we estimate that of the 61 small business MDS auction winners, 48 remain small business licensees. In addition to

³³⁰ See Letter to Margaret Wiener, Deputy Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from Gary Jackson, Assistant Administrator, Small Business Administration, dated July 28, 2000.

³³¹ See Service Rules for the 746-764 MHz Bands, and Revisions to part 27 of the Commission’s Rules, WT Docket No. 99-168, Second Report and Order, 15 FCC Rcd 5299 (2000), 65 FR 17599 (Apr. 4, 2000).

³³² Public Notice, “700 MHz Guard Band Auction Closes,” DA 01-478 (rel. Feb. 22, 2001).

³³³ Amendment of Parts 21 and 74 of the Commission’s Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Report and Order*, 10 FCC Rcd 9589, 9593 ¶ 7 (1995) (*MDS Auction R&O*).

³³⁴ 47 C.F.R. § 21.961(b)(1).

³³⁵ See Letter to Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Bureau, from Gary M. Jackson, Assistant Administrator for Size Standards, Small Business Administration, dated March 20, 2003 (noting approval of \$40 million size standard for MDS auction).

³³⁶ Basic Trading Areas (BTAs) were designed by Rand McNally and are the geographic areas by which MDS was auctioned and authorized. See *MDS Auction R&O*, 10 FCC Rcd at 9608 ¶ 34.

the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent MDS licensees that have gross revenues that are not more than \$40 million and are thus considered small entities.³³⁷ After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 440 MDS licensees that are defined as small businesses under either the SBA's or the Commission's rules. Some of those 440 small business licensees may be affected by the proposals in the Further Notice.

In addition, the SBA has developed a small business size standard for Cable and Other Program Distribution,³³⁸ which includes all such companies generating \$12.5 million or less in annual receipts.³³⁹ According to Census Bureau data for 1997, there were a total of 1,311 firms in this category, total, that had operated for the entire year.³⁴⁰ Of this total, 1,180 firms had annual receipts of under \$10 million, and an additional 52 firms had receipts of \$10 million or more but less than \$25 million.³⁴¹ Consequently, we estimate that the majority of providers in this service category are small businesses that may be affected by the rules and policies proposed in the Further Notice.

Finally, while SBA approval for a Commission-defined small business size standard applicable to ITFS is pending, educational institutions are included in this analysis as small entities.³⁴² There are currently 2,032 ITFS licensees, and all but 100 of these licenses are held by educational institutions. Thus, we tentatively conclude that at least 1,932 ITFS licensees are small businesses.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements.

The NPRM does not propose any specific reporting, recordkeeping or compliance requirements. However, we seek comment on what, if any, requirements we should impose if we adopt the proposals set forth in the NPRM.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered.

³³⁷ 47 U.S.C. § 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standard for "other telecommunications" (annual receipts of \$12.5 million or less). See 13 C.F.R. § 121.201, NAICS code 517910.

³³⁸ 13 C.F.R. § 121.201, NAICS code 517510.

³³⁹ *Id.*

³⁴⁰ U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 4 (issued October 2000).

³⁴¹ *Id.*

³⁴² In addition, the term "small entity" under SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)-(6). We do not collect annual revenue data on ITFS licensees.

The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in developing its approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small Entities.³⁴³

As stated earlier, we seek to minimize regulatory costs and eliminate unnecessary regulatory burdens to the deployment of spectrum-based services in rural areas. Therefore, we believe that modifying or eliminating certain rules should decrease the costs associated with regulatory compliance for licensees and increase flexibility in a manner that will facilitate access, capital formation, build-out and coverage in rural areas. We therefore anticipate that, although it seems likely that there will be a significant economic impact on a substantial number of small entities, there will be no adverse economic impact on small entities. In fact, certain of the proposed rules may particularly benefit small entities.

For example, the NPRM proposes that spectrum in rural areas that is leased by a licensee, and for which the lessee meets the performance requirements that are applicable to the licensee, should be construed as “used” for the purposes of this proceeding and any performance requirements we adopt.³⁴⁴ Although adoption of this proposal would benefit both small and large entities in the radio services where leasing is allowed, the majority of businesses in these radio services are small entities.

The NPRM further proposes a “substantial service” construction benchmark for all wireless services licensed on a geographic basis.³⁴⁵ We believe this proposal, if adopted, will affect small and large entities alike by providing increased flexibility, particularly in rural areas, for licensees to meet their performance requirements.

In addition, the NPRM proposes to modify the eligibility restrictions on the use of spectrum within the Basic Exchange Telephone Radio Systems (BETRS) to allow more flexible use of the spectrum.³⁴⁶ We believe this proposal, if adopted, will provide a particular benefit to small entities by providing current BETRS licensees, of which a majority are small entities, with increased flexibility to use BETRS spectrum.

³⁴³ 5 U.S.C. § 603 (c).

³⁴⁴ NPRM at ¶ 20, *supra*.

³⁴⁵ NPRM at ¶ 35, *supra*.

³⁴⁶ NPRM at ¶ 115, *supra*.

In the NPRM, then, the Commission has set forth various options it is considering for each rule, from modifying them to eliminating them all together. We seek comment on any additional appropriate alternatives and especially alternatives that may further reduce economic impacts on small entities.

F. Federal Rules that May Duplicate, Overlap or Conflict with the Proposed Rules

None.

**APPENDIX B:
PROPOSED RULE CHANGES**

Part 22 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 22 continues to read as follows:

AUTHORITY: 47 U.S.C. 154, 222, 303, 309 and 332.

2. Section 22.702 is amended to read as follows:

§ 22.702 Eligibility.

Existing and proposed communications common carriers are eligible to hold authorizations to operate conventional central office, interoffice and rural stations in the Rural Radiotelephone Service. Subscribers are also eligible to hold authorizations to operate rural subscriber stations in the Rural Radiotelephone Service.

Part 24 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 24 continues to read as follows:

AUTHORITY: 47 U.S.C. 154, 301, 302, 303, 309 and 332.

2. Section 24.203(a) is amended to read as follows:

§ 24.203 Construction requirements.

(a) Licensees of 30 MHz blocks must serve with a signal level sufficient to provide adequate service to at least one-third of the population in their licensed area within five years of being licensed and two-thirds of the population in their licensed area within ten years of being licensed. Alternatively, licensees may provide "substantial service" to their licensed area within ten years. Licensees may choose to define population using the 1990 census or the 2000 census. Failure by any licensee to meet these requirements will result in forfeiture or non-renewal of the license and the licensee will be ineligible to regain it.

Part 90 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 90 continues to read as follows:

AUTHORITY: Sections 4(i), 11, 303(g), 303(r), and 332(c)(7) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 161, 303(g), 303(r), 332(c)(7).

2. Section 90.155(d) is amended to read as follows:

§ 90.155 Time in which station must be placed in operation.

(d) Multilateration LMS EA-licensees, authorized in accordance with § 90.353 of this part, must

construct and place in operation a sufficient number of base stations that utilize multilateration technology (see paragraph (e) of this section) to provide multilateration location service to one-third of the EA's population within five years of initial license grant, and two-thirds of the population within ten years. Alternatively, licensees may provide "substantial service" to their licensed area within ten years. In demonstrating compliance with the construction and coverage requirements, the Commission will allow licensees to individually determine an appropriate field strength for reliable service, taking into account the technologies employed in their system design and other relevant technical factors. At the five and ten year benchmarks, licensees will be required to file a map and FCC Form 601 showing compliance with the coverage requirements (see § 1.946).

3. Section 90.685(b) is amended to read as follows:

§ 90.685 Authorization, construction and implementation of EA licenses.

(b) EA licensees in the 806-821/851-866 MHz band must, within three years of the grant of their initial license, construct and place into operation a sufficient number of base stations to provide coverage to at least one-third of the population of its EA-based service area. Further, each EA licensee must provide coverage to at least two-thirds of the population of the EA-based service area within five years of the grant of their initial license. Alternatively, EA-based licensees may provide substantial service to their markets within five years of the grant of their initial license. Substantial service shall be defined as: "Service which is sound, favorable, and substantially above a level of mediocre service."

4. Section 90.767 is amended to read as follows:

§ 90.767 Construction and implementation of EA and Regional licenses.

(a) An EA or Regional licensee must construct a sufficient number of base stations (i.e., base stations for land mobile and/or paging operations) to provide coverage to at least one-third of the population of its EA or REAG within five years of the issuance of its initial license and at least two-thirds of the population of its EA or REAG within ten years of the issuance of its initial license. Alternatively, licensees may provide "substantial service" to their licensed area at their five- and ten-year benchmarks.

(b) Licensees must notify the Commission in accordance with § 1.946 of this chapter of compliance with the Construction requirements of paragraph (a) of this section.

(c) Failure by an EA or Regional licensee to meet the construction requirements of paragraph (a) of this section, as applicable, will result in automatic cancellation of its entire EA or Regional license. In such instances, EA or Regional licenses will not be converted to individual, site- by-site authorizations for already constructed stations.

(d) EA and Regional licensees will not be permitted to count the resale of the services of other providers in their EA or REAG, e.g., incumbent, Phase I licensees, to meet the construction requirement of paragraph (a) or (b) of this section, as applicable.

(e) EA and Regional licensees will not be required to construct and place in operation, or commence service on, all of their authorized channels at all of their base stations or fixed stations.

5. Section 90.769 is amended to read as follows:

§ 90.769 Construction and implementation of Phase II nationwide licenses.

(a) A nationwide licensee must construct a sufficient number of base stations (i.e., base stations for land mobile and/or paging operations) to provide coverage to a composite area of at least 750,000 square kilometers or 37.5 percent of the United States population within five years of the issuance of its initial license and a composite area of at least 1,500,000 square kilometers or 75 percent of the United States population within ten years of the issuance of its initial license. Alternatively, licensees may provide "substantial service" to their licensed area at their five- and ten-year benchmarks.

(b) Licensees must notify the Commission in accordance with § 1.946 of this chapter of compliance with the *Construction requirements* of paragraph (a) of this section.

(c) Failure by a nationwide licensee to meet the construction requirements of paragraph (a) of this section, as applicable, will result in automatic cancellation of its entire nationwide license. In such instances, nationwide licenses will not be converted to individual, site-by-site authorizations for already constructed stations.

(d) Nationwide licensees will not be required to construct and place in operation, or commence service on, all of their authorized channels at all of their base stations or fixed stations.

**SEPARATE STATEMENT OF
CHAIRMAN MICHAEL K. POWELL**

Re: Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies To Provide Spectrum-Based Services

Wireless facilities-based providers are delivering remarkable competition and innovation in rural markets. However, just because the Commission's policies work, does not mean they cannot work better.

Our actions over the past few months dramatically illustrate our resolve to bring competitive, quality, spectrum-based services to rural America. Last month alone, we supported a series of items that: advanced digital TV deployment in rural America, expanded outreach to underserved communities, reported on the state of rural broadband deployment, reported on our partnership with RUS, and announced the Rural Wireless Internet Service Provider Forum for September 18. And today, three items on the agenda – including this one – have elements aimed at advancing the Commission's rural-service vision.

The Notice we adopt today includes initiatives and policies aimed directly at facilitating access to capital and lowering regulatory and market barriers to spectrum and infrastructure in rural areas. This Notice also seeks comment on how we can clarify rules, minimize regulatory costs, and provide other incentives to promote service to rural markets. While a number of past Commission measures have been intended to foster the deployment of wireless services throughout the country, the Notice we adopt today for the first time expands upon these measures and will help ensure that rural Americans can experience the breadth of wireless service offerings currently available and further fulfill the Commission's statutory mandate to make available, in a rapid and efficient manner, communications services to all Americans.

**SEPARATE STATEMENT OF
COMMISSIONER KATHLEEN Q. ABERNATHY**

Re: Facilitating the Provisions of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services, Notice of Proposed Rulemaking (WT Docket No. 03-202)

This NPRM is the next step in our examination of how the FCC can amend its spectrum regulations and policies in order to promote the rapid and efficient deployment of spectrum-based services in rural areas. It follows many actions that we have taken in this area, including the recent adoption of an order creating a secondary market for spectrum and increasing the amount of spectrum available for use for unlicensed services, such as wi-fi.

Given the high value consumers place on the ability to communicate anywhere, anytime the Commission wants to ensure that we are promoting and encouraging the efficient utilization of spectrum in rural areas. Wireless services have become pervasive in many of our day-to-day lives as we rely on them for personal, business and safety reasons. Rural America has the same needs and the same demand for better, smarter, faster communications capabilities.

I am looking forward to reviewing the record in this proceeding to understand commenters' views on whether the proposals promote the deployment of efficient spectrum-based services to rural areas.

**SEPARATE STATEMENT OF
COMMISSIONER MICHAEL J. COPPS**

RE: Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies To Provide Spectrum-Based Services; 2000 Biennial Review Spectrum Aggregation Limits for Commercial Mobile Radio Services; and Increasing Flexibility To Promote Access to and the Efficient and Intensive Use of Spectrum and the Widespread Deployment of Wireless Services, and To Facilitate Capital Formation.

I would like to thank the Chairman for continuing to move forward with this important proceeding. Over the past several years I have noted in statements, along with my colleagues, that we need to redouble our efforts to promote wireless service in rural areas. The Commission has specific and significant statutory obligations to ensure that we manage the spectrum to the benefit of rural Americans. In response, the Chairman agreed to initiate last-year's NOI in this proceeding, which has now yielded this important NPRM. So, I'd like to thank him.

I support this NPRM, whole-heartedly in some places, with reservations in others. We seek comment on how to determine what areas are truly rural. We propose to allow higher power limits in areas where this will not unduly increase interference, in order to give rural carriers more coverage. We discuss the benefits of auctioning spectrum on an RSA basis, and ask where we ought to do so. And we ask how we can work with RUS in a more constructive way. All this goes down the right track.

I have reservations about other parts of this NPRM. For example, we seek comment on whether we should eliminate the cellular cross ownership rule in some rural areas. I am concerned that it may be a mistake to eliminate this rule and rely on an unpredictable case-by-case review process that is not guided by any written Commission standards. I am pleased that we tentatively conclude to keep the rule in markets where there are three or fewer carriers. Remember that while many cities boast six competitors, consumers in more than 25% of U.S. counties have three or fewer wireless carriers to choose from. So because we tentatively conclude to maintain the rule for the most vulnerable markets, and because we make no proposal on whether to eliminate the rule elsewhere, I can support this section of the item.

I am most concerned that the NPRM considers allowing companies to use their FCC licenses as collateral when seeking loans with the RUS. Spectrum and FCC licenses are not property. They should not be property. Congress is clear on this matter. If we allow companies to grant security interests in licenses we will be taking a big step toward spectrum proprietization. This NPRM limits it questions to where the RUS, a part of the federal government, is the holder of the security interest. Because of this limitation, and because we do not make any proposal or tentative conclusion on the matter, I will support the item. But my deep concerns with granting authority to use FCC licenses as collateral remain. In fact, they grow every day. This policy could well violate the Communications Act. I do not see how we can allow companies to use licenses as collateral without violating the intent of Congress to keep control and ownership of spectrum and licenses in the hands of American citizens rather than private interests.

From the time I first called for a proceeding on promoting rural wireless up to today, I have supported creative ways of achieving this goal. But we have to do some cost-benefit analysis here. I fear that allowing the use of security interests could provide precious little

benefit compared to the potentially large cost to the spectrum management system. The marginal improvement in access to capital may be small, given that companies today can already grant security interests in stock and in the proceeds of a license sale. But the costs are potentially huge. Allowing security interests could undermine our authority in Sections 301 and 304 of the Act. The FCC's basic ability to develop wireless policy and manage interference could be threatened. If a court is convinced that an FCC decision to require additional CALEA compliance, E-911 public safety actions, or to change operations to reduce interference unduly puts the investment of a security interest holder at risk, could that court tie the Commission's hands? If so, we would be unable to do our job. Finally, after NextWave, we should be wary of decisions that put us at a disadvantage in bankruptcy disputes. Yet, allowing security interests creates great uncertainty in this context, and could lead to the Commission being unable to protect public funds when a licensee declares bankruptcy.

But this section of the item merely asks questions. Because of the limited nature of this section of the item, because we are not considering allowing any party other than RUS to hold a security interest, and because of the presence of these good probing questions, I can support this section of the item.

The Bureau has done a good job seeking comment on each of the worries that I just mentioned. I also want to acknowledge and thank my colleagues for working to make this a better item as we went through the deliberative process. I hope that people will pay attention to this proceeding and file comments. I want to especially encourage folks who share my doubts to respond fulsomely to this NPRM. We need to know the implications of this decision fully before acting. We certainly do not have the answers yet. So we need your help.

**SEPARATE STATEMENT OF
COMMISSIONER KEVIN J. MARTIN**

Re: Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services (WT Docket No. 02-381); 2000 Biennial Regulatory Review Spectrum Aggregation Limits for Commercial Mobile Radio Services (WT Docket No. 01-14); and Increasing Flexibility to Promote Access to and the Efficient and Intensive Use of Spectrum and the Widespread Deployment of Wireless Services, and to Facilitate Capital Formation.

I have always maintained that one of the Commission's most important priorities is to facilitate the deployment of communications services in rural America. Wireless services are particularly critical in rural communities where such technologies may provide not only the most efficient, but sometimes the only practical method of offering communications services. Accordingly, it is crucial that we fulfill our obligation to promote the development and rapid deployment of wireless services in rural America.

The item we consider today raises a broad set of questions, ranging from how to define "rural," to whether technical changes such as modified power limits in rural areas will further our goals, to requesting input on how we can maximize our partnership with the USDA and the Rural Utilities Services program. I am glad we are asking these questions and addressing these important issues. I look forward to seeing the comments responding to this NPRM.

**SEPARATE STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN**

Re: Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services; WT Docket No. 02-381

At our last open meeting, we shed an important light on the Commission's ongoing efforts to support the deployment of basic and advanced telecommunications services to those Americans living in our Nation's rural communities. At that time I highlighted my goal of implementing policies that provide for and maintain a rural telecommunications system that is second to none. In that light, I am very pleased to support this Notice of Proposed Rule Making (NPRM) because spectrum-based communications can play such an integral part of that telecommunications network.

The NPRM tackles a number of the issues that I believe are so critical to promoting the provision of spectrum-based services in rural areas. Not only do we address the nuts and bolts of how we define "rural," but we also look at some of the more challenging issues such as performance requirements and relaxed power limits for licensed services.

I am particularly supportive of the request for comment on ways the Commission can support the USDA's Rural Utilities Service (RUS) Telecommunications Program. As I mentioned at our last meeting, I had the privilege of working on legislation authorizing and providing funds to the RUS for deployment of broadband services in rural areas when I was a staffer in the Senate as part of last year's Farm Bill. It is so worthwhile to explore how the Commission can support the wireless applications of this program, as I truly believe that spectrum-based services offer great potential to Rural America.

I also am pleased to support our limited question on the ability of the Commission to allow security interests by RUS in FCC licenses. I very much appreciate the efforts of the Wireless Telecommunications Bureau staff to draft a section that presents a balanced discussion of this novel issue. I take very seriously Congress' charge that we manage the nation's airwaves because spectrum is a finite public national resource, with characteristics unlike that of any other. The Commission always must retain the authority and flexibility to regulate the rights and responsibilities of its licensees. RUS, because it also is part of the Federal Government, may be an appropriate holder of a security interest, particularly as it is my understanding that RUS retains the security interests it holds through its rural loan program. I believe that the document as drafted weighs these important considerations in asking the questions of whether or not we should or even can allow RUS to hold security interests in FCC licenses.

Finally, while I do have some concerns with the question of a possible modification to the cellular-cross ownership rule, I am encouraged by the tentative conclusion to retain the rule for those RSA that are served by three or fewer providers. I believe that we have set the bar sufficiently high to changing the rule for those mobile wireless markets that are served by the fewest providers.